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No. 441

In the Supreme Court of the United States

OCTOBER TERM, 1934

UNITED STATES MORTGAGE COMPANY and MORTGAGE GUARANTEE COMPANY, PETITIONERS,

vs.

MARY E. MATTHEWS and JOHN MATTHEWS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR PETITIONERS

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I

OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals of Maryland has not yet been officially reported, but was published in the Atlantic Reporter, Volume 173, page 903. It also appears on page 116 of the Record. The opinion of the Circuit Court No. 2 of Baltimore City is not officially reported; it was published in The Daily Record (Baltimore, Maryland) on the 23rd day of March, 1934, and it appears on page 97 of the Record.

II

JURISDICTION

The case is here on writ of certiorari granted by this Court on November 5, 1934, pursuant to Section

237 of the Judicial Code as amended by the Acts of February 13, 1925, Chapter 229, Section 1 (U. S. C. A., Title 28, Section 344 (b)). The nature of the case and the decision of the Court of Appeals of Maryland is such as to bring the case within the terms of the statutory provision aforesaid, in that the validity of a statute of the State of Maryland was assailed as unconstitutional and the Court of Appeals of Maryland held the same to be unconstitutional and void on the sole ground that it was in conflict with Section 10 of Article 1 of the Constitution of the United States.

III

STATUTORY PROVISIONS INVOLVED

The challenged statute is Chapter 56 of the Acts of the General Assembly of Maryland, Special Session 1933. This statute is claimed to be invalid because of its effect on a statutory remedy for the foreclosure of mortgages provided by Chapter 123 of the Acts of 1898. The relevant sections of these statutes are printed in full in Appendix A attached to this brief.

IV

STATEMENT OF THE CASE

The purpose of this proceeding is to review a decision of the Court of Appeals of Maryland, holding invalid Chapter 56 of the Acts of 1933, Special Session of the General Assembly of Maryland. That Act sought to restrict the use of a special statutory form of procedure for the foreclosure of mortgages to the holders of not less than a 25% interest in any mortgage. The Court of Appeals of Maryland held that

this legislation, in its retrospective operation, impaired the obligation of mortgage contracts in violation of Section 10 of Article 1 of the Constitution of the United States.

The procedure which the Act of 1933 was intended to regulate was provided by Chapter 123 of the Acts of 1898, Sections 720 to 732 inclusive, now codified as Sections 720 to 732 of Article 4 of the Code of Public Local Laws of Maryland, titled "Baltimore City", subtitled "Mortgages" 1930 Edition. Section 720 provides in part:

> In all cases of conveyances * * * wherein the mortgagor shall declare his assent to the passing of a decree for the sale * * *, it shall be lawful for the mortgagee, or his assigns, at any time after filing the same to be recorded, to submit to either of the Circuit Courts of Baltimore City the said conveyances or copies thereof * * * who shall thereupon forthwith decree that the mortgaged premises shall be sold at any one of the periods limited in said conveyances for the forfeiture of said mortgages * * *.

There was no amendment of this section after its enactment until the passage of Chapter 56 of the Acts of 1933, Special Session, which provides in part as follows:

> In all cases submitted to either of the Circuit Courts of Baltimore City for the passage of a decree as provided for in Section 720 aforesaid, no such decree shall hereafter be passed during the period of emergency hereinafter declared, unless such application is made or concurred in by

the record holders of not less than 25% of the entire unpaid mortgage debt, it being hereby declared to be the intent of this section, during the period this section is effective, that the holder or holders of a fractional interest in an entire mortgage debt of less than 25% of the entire interest, shall not have recourse to the summary and ex parte remedies given under Section 720.

That the period of the emergency herein declared as a matter of legislative determination shall be the period of time from the date this act takes effect to the first day of June, 1935.

That this Act is declared to be an emergency law and necessary for the immediate preservation of the public health and safety, * * *.

On July 30, 1932, the Respondents, Mary E. Matthews and John Matthews acquired an undivided 500/2950 share in a certain mortgage dated July 30, 1925, from Walter H. Warner to Mortgage Guarantee Company, a Delaware corporation, on property located in Baltimore City (Record p. 8). This mortgage contained the following language (Record p. 5):

"And the said mortgagor doth hereby declare his assent to the passing of a decree by the Circuit Court of Baltimore City or the Circuit Court No. 2 of Baltimore City, for a sale of the property hereby mortgaged in accordance with Sections 720 to 732 inclusive of Chapter 123 of the laws of Maryland passed at the January session 1898 or any amendments or additions thereto."

On December 22, 1933, seven days after the amendatory act became effective, the Respondents petitioned

the Circuit Court No. 2 of Baltimore City for a decree and the appointment of a trustee to make sale of the property (Record p. 2), under the Act of 1898 referred to in the mortgage, whereupon Petitioners, United States Mortgage Company, the then owner of the equity of redemption in the property covered by the mortgage, and Mortgage Guarantee Company, the holder of record, or the duly authorized representative of the holders of record of approximately 83% of the unpaid mortgage debt, appeared and were permitted to intervene in the proceedings, setting up the provisions of Chapter 56 of the Acts of 1933, Special Session, as a reason why the petition of the Respondents should not be granted (Record p. 10).

In the trial court testimony was taken to substantiate the legislative findings of an emergency (Record pp. 34-97) which tended to show the following facts:

(1) That there is no market for large real estate in Baltimore City; (2) that partial assignments of mortgages are frequently made in the case of mortgages on large properties; (3) that the aggregate amount of such partial assignments runs into millions of dollars; (4) that these assignments are in the hands of thousands of investors, scattered throughout Maryland and nearby states, frequently in denominations as small as $50.00; (5) that this summary method of foreclosure sale confers upon small investors an opportunity to inflict enormous losses upon their co-investors through precipitating a sale of mortgaged property on a market where there are neither bidders nor buyers, in an ex-

parte proceeding and upon notice which is utterly inadequate to enable their co-investors to take any effective measures for their protection; (6) that this practice tended further to demoralize an already prostrate real estate market, the condition of which was of vital importance to savings banks, insurance companies and fiduciary institutions and, in effect, the entire public; (7) that this remedy was being taken advantage of by heedless investors.

The evidence further tended to show that it was a practice of many mortgage or other loan companies, in making mortgage loans on large buildings or other projects, the size of which were too large to be taken and held as a whole by individual or institutional investors, to split up the entire mortgage debt, and in lieu of issuing notes or bonds secured by the mortgage, to assign undivided interests therein to individual investors.

The Circuit Court No. 2 of Baltimore City, in its opinion (Record p. 97) held Chapter 56 of the Acts of 1933, Special Session, to be unconstitutional and entered a decree for the sale of the mortgaged property. From this decree the Petitioners appealed to the Court of Appeals of Maryland, who held the Act to be unconstitutional and void on the ground that it conflicted with Section 10 of Article 1 of the Constitution of the United States (Record p. 116), although holding at the same time that the Act did not deprive the holders of less than a 25% interest in mortgages of the equal protection of the laws, for the reason that the classifi-

cation adopted by this legislation was reasonably adapted to meet "an evil found by the Legislature to exist", namely "that under the provisions of the existing law the holders of minute fractions of a mortgage were making use of its provisions in cases where the real and substantial interest of the large majority holders in a given mortgage would have their security and the opportunity of realizing the full amount of the mortgage seriously endangered" (Record p. 126). From the decree of the Court of Appeals of Maryland the Petitioners applied to this Court for a writ of certiorari, which was granted November 5, 1934. (Record p. 128).

REMEDIES FOR ENFORCING THE MORTGAGE LIEN IN MARYLAND

The several remedies available to a mortgagee to enforce his lien against the mortgaged property were referred to in the opinion of the Court of Appeals of Maryland (Record p. 122). Some further discussion of these modes will be found in the opinion of the Circuit Court No. 2 of Baltimore City (Record p. 102 et seq). To repeat here what is there said is thought unnecessary.

All foreclosure proceedings in Maryland fall into two categories:

1. By bill in equity wherein (a) strict foreclosure or (b) foreclosure by sale, may be decreed; and

2. Foreclosure by summary proceedings under (a) an assent to a decree contained in the mortgage (local to Baltimore City), (b) a power of sale authorized by

the mortgage, or (c), a sale upon breach of condition or happening of future event authorized by the mortgage or other instrument.

1. *Foreclosure by bill in equity*

The power to foreclose after default is one of the ordinary powers of a Court of Chancery in Maryland, existing independently of any assent of the mortgagor or of the provisions of the mortgage. *Ahrens v. Ijams,* 158 Md. 412, 417; *Warehime v. Carroll County Building Association,* 44 Md. 512, 516. The proceedings for foreclosures by bill are in conformity with the regular pleadings and practice in equity. They are commenced by filing an appropriate bill. The defendants are subpoenaed if within the jurisdiction, if not the suit is conducted as one in rem and is prosecuted on process by publication. After the answer is filed, if an issue is raised, evidence is taken. If the case is admitted or made out, the court passes a decree. So long as it was the practice to decree strict foreclosure, the decree fixed a time when the mortgage debt should be paid or brought into court and declared the right of redemption to be forever foreclosed if the money was not paid within the period fixed. But since the passage of the Act of 1785, Chapter 72, now codified as Section 232, Article 16, Code of Public General Laws (1924 Ed.), wherein a court of equity was authorized to decree that the property mortgaged, or so much thereof as might be necessary for the satisfaction of the mortgage debt and costs, should be sold, strict foreclosure has been practically supplanted by a decree to sell.

This decree directs that unless the mortgage debt with interest thereon until paid, and the complainant's costs to be taxed by the clerk, are paid or brought into court on or before a day fixed in the decree, then the property is to be sold. The decree appoints a trustee to make the sale and prescribes the course and manner of his proceeding. It further provides that the trustee shall give bond and shall give notice by advertisement of the time, place, manner and terms of sale and prescribes the manner in which the advertisement is to be made and fixes the terms of sale. At the time appointed for the sale, the trustee, in person, proceeds to the place fixed and makes sale in accordance with the terms of the decree and as advertised.

The property having been sold, the trustee makes a report of sale to the Court with an affidavit to its truth. So soon as the report is made, the court or the clerk passes an order that the sale be ratified and confirmed unless cause to the contrary be shown before a specified time. If no exceptions are made to the sale, or, if made and overruled, the court, on or after the day specified, passes an order of final ratification of the sale and the matter is then referred to an auditor to state an account, which is returned to the court. The court passes an order of ratification nisi on the auditor's account and after the expiration of a specified time, the same is finally ratified.

If it is sought to foreclose a mortgage in the United States Courts in this district, the substantial equivalent of this proceeding is the only remedy available to

the mortgagee. The procedure is neither more nor less burdensome than any other suit conducted in conformity with the regular pleadings and practice in equity.

For further treatment of the foreclosure of mortgages in Maryland by bill in equity, see MILLER, EQUITY PROCEDURE (1897) Section 445 et seq.; VENABLE, SYLLABUS ON LAW OF ESTATES, pages 214 to 220. Also pages 177 et seq.

2. *Foreclosure by summary proceedings*

The three methods of foreclosure of a mortgage by summary proceedings all owe their existence to statutes and their availability to mortgagees are dependent upon the assent of the mortgagor or the provisions of the mortgage.

(a) Under an assent to a decree contained in the mortgage.

This remedy is provided by Chapter 123 of the Acts of 1898, Sections 720 to 732, inclusive, now codified as Sections 720 to 732, inclusive, of Article 4 of the Publice Local Laws of Maryland, title "Baltimore City," sub-title "Mortgages," 1930 Edition. It is evident that the language of the mortgage is not intended to create a remedy but merely meets a condition precedent to the exercise of a remedy provided by the statute. The proceeding is commenced by a petition filed by the mortgagee and is entirely ex parte, and *no notice at any stage of the proceedings is required to be given to the mortgagor.* In order to obtain the decree it is

only necessary to file the mortgage and petition for the decree. No summons is necessary, no notice is required to be given to the mortgagor or to any person claiming under him. No prior or subsequent mortgagors or encumbrancers need be made parties, no testimony need be taken, no hearing had and no affidavits or other proof of title to the mortgage debt submitted. The mortgagee is entitled to the decree at any time after the recording of the mortgage and without regard to default. If there has been no default, the decree is entered prospectively. If no default occurs it never becomes effective, but should there be a default afterward occurring, the decree is enforced. *Ahrens v. Ijams,* 158 Md. 412, 418.

The usual practice is to draw the decree so as to fully prescribe the duties of the Trustee appointed to make the sale. Upon the occurrence of a default, the mortgaged property can be advertised at once and the Trustees bond and a statement of the mortgage claim may be filed at any time before the sale is made. The property having been sold, the Trustee makes a report of sale to the Court and the proceedings from this point to the close are in conformity with regular foreclosure proceedings.

It is sometimes said that the act creates a special or limited jurisdiction in the two Circuit Courts of Baltimore City or the decree is loosely referred to as a "consent decree." Both of these points were decided in the negative in the early case of *Williams v. Williams,* 7 Gill. (Md.) 302, in which it was further

stated, at page 305, that the statute simply provides a summary mode of reaching the decree.

This remedy has been aptly described as the summary and peculiar proceedings prescribed by the Legislature. *Cronise v. Clark,* 4 Md. Ch. 403, 408, and in *Ahrens v. Ijams, supra,* page 418, it was said "there must be a strict compliance with the provisions of a statute creating a remedy of such summary nature and its operation should not be enlarged beyond the limits set by the legislative intention." *Owens v. Graetzel,* 146 Md. 361. The assent contained in the mortgage confers no jurisdiction upon the court to pass the decree. Its jurisdiction is dependent entirely upon the continuing existence of the statute. *Warehime v. Carroll County Building Association,* 44 Md. 512, 516.

The right of an assignee of any part of the mortgage debt to a decree under the act was established in *Richardson v. Owings,* 86 Md. 663.

For further treatment of the foreclosure of mortgages in Maryland under an assent to a decree, See MILLER, EQUITY PROCEDURE (1897) Section 474 et seq.; VENABLE, SYLLABUS ON LAW OF ESTATES, pages 222 to 224. Also see Annotations to Sections 720 to 732 inclusive of the Act of 1898, in Article 4 of the Code of Public Local Laws of Maryland (1930 Edition) entitled "Baltimore City", sub-title "Mortgages" under the respective sections.

(b) Foreclosure under power of sale authorized by the mortgage.

The Court of Appeals of Maryland, in its opinion below made some mention of the power of sale which was contained in the mortgage. The case at bar went up to that court on an appeal from a decree entered under the Act of 1898 and involves the validity of Chapter 56 of the Acts of 1933, Special Session. The validity of Chapter 57 of the Acts of 1933, Special Session, attempting to regulate the exercise of powers of sale is in no way involved in this case and was not presented in either the lower or upper courts. It may be mentioned, however, that this remedy is another form of statutory ex parte foreclosure authorized and regulated by statutes, now codified as Article 66, Sections 6 to 10 inclusive of the Code of Public General Laws (1924 Ed.). These sections are printed in Appendix B attached to this brief.

As some insight into the character of this remedy might be helpful in determining the issues presented in this case, a short summary of the procedure thereunder is also given in Appendix C. The power of sale and its exercise by the mortgagee, his successors or assigns, or by his or their attorneys, is dependent entirely upon statute for its validity. Independent of the statute the power means nothing. It would, therefore, seem that the constitutionality of the amendatory legislation to this remedy would be governed by the same principles that are applicable to the legislation amending the act dealing with an assent to a decree.

(c) A sale upon breach of condition authorized by the mortgage or other instrument.

The statute regulating the exercise of this remedy is in no wise involved in the present case and comment thereon could not be helpful.

V

SPECIFICATION OF ERRORS

The Court of Appeals of Maryland erred in holding Chapter 56 of the Acts of 1933, Special Session, to be unconstitutional and void as in conflict with Section 10 of Article I of the Constitution.

VI

ARGUMENT.

SUMMARY OF THE ARGUMENT

I. Chapter 56 of the Acts of 1933, Special Session, does not impair the obligation of the mortgage contract, in that

POINT A

The assent contained in the mortgage expressly or by necessary implication contemplates *amendments or additions* to the original Act.

POINT B

The Act operates only upon the remedy and does not impair the substantive rights under the mortgage contract.

POINT C

An economic condition constituting an emergency existing (and continuing), the Act is a legitimate exercise of the police power of the State.

II. Chapter 56 of the Acts of 1933, Special Session, does not deny respondents the equal protection of the laws.

I.

POINT A

THE ASSENT CONTAINED IN THE MORTGAGE EXPRESSLY OR BY NECESSARY IMPLICATION CONTEMPLATES *AMENDMENTS OR ADDITIONS* TO THE ORIGINAL ACT

Where the contract clause is invoked we believe this Court will determine for itself what the contract is and whether it has been impaired. *Funkhauser v. Preston Co.*, 290 U. S. 163.

The assent to the passing of a decree as the same appears in the mortgage (Record p. 5) is "in accordance with Sections 720 to 732 inclusive of Chapter 123 of the Laws of Maryland, passed at the January Session 1898 or any *amendments or additions thereto.*" (Italics ours). It would seem that the intention of the parties was that the assent was to be of such legal significance and effect as was given to it by the Act referred to, as amended or added to, at the time that the remedy was exercised, particularly when there were no existing amendments or additions to the Act which the parties could have had in mind at the time that the mortgage was executed.

The Court of Appeals of Maryland declined to accept this construction and while admitting that at the time the language was incorporated in the mortgage there had been no amendments or additions to these sections of the Act, found that the intention of the parties in employing that language embraced only such amendments or additions as had been made prior to the execution of the mortgage. (Record p. 121).

This we regard as unsound as it is not to be presumed that parties, in their choice of language in a formal instrument, will refer expressly to amendments or additions to a statute which do not exist. In using the language which they did, they must have had in contemplation future amendments or additions.

Stipulations in mortgages for a method of foreclosure created or regulated by statute have been construed by other courts to refer to the remedy as existing at the time it was resorted to. *Scott et al. v. District Court et al.*, 15 N. D. 259; *State, etc v. Circuit Court* (S. D. 1933), 249 N. W. 631. This construction of the assent would also be in accordance with the presumption, often entertained by this Court, that parties make their contracts with reference to the power of the State (within proper limits) to regulate the methods of procedure in actions thereon. *Henley v. Myers*, 215 U. S. 373.

POINT B

THE ACT OPERATES ONLY UPON THE REMEDY AND DOES NOT IMPAIR THE SUBSTANTIVE RIGHTS UNDER THE MORTGAGE CONTRACT

In the opinion of the Court of Appeals it is said: (Record p. 126):

> "We must bear in mind that this legislation deals solely with a remedy,

There are many decisions of this Court upholding as mere changes in remedies legislation assailed under the contract clause; so also are there decisions invalidating legislation on the ground that attempted

changes in remedies impaired substantial rights. See *Home Bldg. & L. Assn. v. Blaisdell,* 290 U. S. 398, 429-434. The rationale of these decisions is not always clear and the principles enunciated appear to compete with, rather than to complement one another. cf. Mr. Justice McKenna in *Conley v. Barton,* 260 U. S. 677, 681. Chancellor Kent found it possible to assert that the better rule does not permit the modification or abrogation of any remedy available to the parties when the contract is made. See Commentaries, I, p.*419, note a. On the other hand Judge Cooley said (Constitutional Limitations, 8th ed., 585-587):

> "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made. It has accordingly been held that laws changing remedies for the enforcement of legal contracts, or abolishing one remedy where two or more existed, may be perfectly valid, even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy."

Choice between these apparently conflicting opinions must rest upon the determination of an issue raised as long ago as *Ogden v. Saunders,* 12 Wheat, 212, namely, whether the distinction taken in *Sturges v. Crowninshield,* 4 Wheat. 122, between the obligation of a contract and the remedy given by the legislature to enforce the obligation, is a distinction of substance or one

merely of form. Chief Justice MARSHALL expressed his view on this question with his accustomed power in *Ogden v. Saunders, supra* (p. 349), where he declared that the distinction was one of substance. It is evident that a majority of the court concurred in these views for they find immediate application in *Mason v. Haile,* 12 Wheat. 370, where legislation releasing a debtor from imprisonment was held a good defense to a suit on his bond.

The extent to which the principles enunciated by Chief Justice MARSHALL had found their way into the body of our constitutional law was considered in the opinion delivered by Chief Justice TANEY in *Bronson v. Kinzie,* 1 Howard 311, p. 315 where he said:

> "If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. * * * It must reside in every state to enable it to secure its citizens from unjust and harrassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is

produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution.

* * * * *

"We concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

In *Tennessee v. Sneed*, 96 U. S. 69, a writ of mandamus was sought to compel acceptance in payment of taxes, of notes issued by the Bank of Tennessee pursuant to a charter expressly providing that such notes should be accepted in payment of taxes. Long after the bank was chartered the legislature afforded by statute a remedy of mandamus, but thereafter repealed this statute, at the same time prohibiting tax collectors from accepting the notes in payment of taxes. This last legislation further provided that any taxpayer tendering such notes must first pay the tax under protest in other specified currency and thereafter institute suit to recover the tax so paid. The act was sustained as against the objection that it impaired the obligation of contract, this Court after reviewing prior decisions saying (p. 74):

> "If a particular form of proceeding is prohibited, and another is left or is provided which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired. *Bronson v. Kinzie, supra; Huntzinger v. Brock,* 3 Grant's Cases (Pa.), 243; *Evans v. Montgomery,* 4 Watts & S. (Pa.) 218; *Read v. Frankfort Bank,* 23 Me. 318.
>
> The rule seems to be that in modes of proceeding and of forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right. *Bronson v. Kinzie, supra.*"

So in *Penniman's Case,* 103 U. S. 714, 720 where an act abolishing imprisonment for debt was sustained as against the attack of one who had obtained a judgment prior to its passage this Court said:

> "The general doctrine of this court on this subject may be thus stated: In modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right."

Perhaps one of the most illuminating opinions delivered by this Court on the subject under consideration is that of Chief Justice WAITE in *Antoni v. Greenhow,* 107 U. S. 769. There a contract between the State of Virginia and its bondholders required the acceptance of coupons in payment of taxes. When the contract

was made the writ of mandamus was available to the taxpayer. Thereafter legislation was enacted prohibiting the acceptance of these coupons in payment of taxes, abrogating the remedy of mandamus, and prescribing a remedy under which the taxpayer, after having first paid the tax in other specified currency and having tendered the coupons to the court, was required to submit to the determination of a jury the question as to the genuineness of the coupons. The burden of paying the costs of this proceeding was placed upon the taxpayer. This legislation was held not to impair the contract, this Court saying (p. 774):

> "It cannot be denied that, as a general rule, laws applicable to the case which are in force at the time and place of making a contract enter into and form part of the contract itself, and 'that this embraces alike those laws which affect its validity, construction, discharge, and enforcement.' *Walker v. Whitehead,* 16, Wall. 314, 317. But it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left. This limitation upon the prohibitory clause of the Constitution in respect to the legislative power of the States over the obligation of contracts was suggested by Chief Justice Marshall in *Sturges v. Crowninshield,* 4 Wheat. 122, and has been uniformly acted on since. *Mason v. Haile,* 12 Wheat. 370; *Bronson v. Kinzie,* 1 How. 311; *Von Hoffman v. City of Quincy,* 4 Wall. 535; *Drehman v. Stifle,* 8 id. 595; *Gunn v. Barry,* 15 id. 611; *Walker v. Whitehead,* 16 id. 314; *Terry v. Anderson,* 95 U. S. 628; *Tennessee v. Sneed,* 96 id. 69; *Louisiana v.*

Pilsbury, 105 id. 278. As was very properly said by Mr. Justice Swayne in *Von Hoffman v. City of Quincy, ubi supra*, 'It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution and to that exetent void.' p. 553. In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge. *Jackson v. Lamphire*, 3 Pet. 280; *Terry v. Anderson, ubi supra*. We ought never to overrule the decision of the legislative department of the government, unless a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account. *Munn v. Illinois*, 94 U. S. 113. We have nothing to do with the motives of the legislature, if what they do is within the scope of their powers under the Constitution."

In *Fourth National Bank v. Francklyn*, 120 U. S. 747, statutes claimed to form a part of a contract, authorized collection from stockholders of the debts of a corporation. By subsequent legislation these statutes were modified "by abolishing the right to take the person of a stockholder for the debt of a corporation; by substituting for the taking of his property on attach-

ment and execution against the corporation, a new form of remedy by action for debt against him upon a judgment obtained against the corporation; and by authorizing him, when so sued, either in equity or at law, to make any defense that the corporation might have made." This Court sustained the latter legislation against the claim that it impaired the obligation of a contract saying, through Mr. Justice GRAY (p. 755):

> "As it does not undertake to annul the liability of the stockholders for the debts of the corporation, but only modifies the form of remedy and the rules of evidence, it is not doubted that it is a constitutional exercise of the power of the legislature, even as applied to debts contracted by the corporation before its enactment. *Hawthorne v. Calef*, 2 Wall. 10; *Penniman's Case*, 103 U. S. 714; affirming 11 R. I. 333; *Ogden v. Saunders*, 12 Wheat. 213, 262, 349; *Webb v. Den*, 17 How. 576; *Curtis v. Whitney*, 13 Wall. 68; *Tennessee v. Sneed*, 96 U. S. 69."

More recently we find Mr. Justice PECKHAM, speaking for this Court in *Waggoner v. Flack*, 188 U. S. 595 saying (p. 602):

> "What particular remedy then existed by which the State might enforce the obligations of the contract made by the purchaser is not material in this aspect of the case. It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing

so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away."

And more recently still in *Ettar v. Tacoma,* 228 U. S. 148, through Mr. Justice LURTON, this Court said (p. 155):

> "Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or deprive one of a vested property right. If the changing or repealing statute leaves the parties a substantial remedy, the legislature does not exceed its authority."

It has been shown that the remedy claimed by Respondents flows from a statute in force at the time when the contract was made. Chapter 56 of the Acts of 1933, Special Session, clearly attempts to deny to the Respondents and others in a similar position, i. e. holders of less than a 25% interest in a mortgage, the right to the remedy provided by the Act of 1898, under an assent to a decree. In other words, in the broadest sense and taking into consideration Chapter 57 of the Acts of 1933, Special Session, regulating the exercise of the power of sale contained in the mortgage, it was the purpose of the Legislature to deny to holders of less than a 25% interest in any mortgage, the right to pursue the peculiar summary proceedings afforded by the statutes for the foreclosure of mortgages. It has also

been shown, however, that there remains to the Respondents and to other mortgagees in like position other remedies in equity for enforcing the mortgage lien, and the question resolves itself into whether the remedy, or remedies, remaining to the Respondents, meet the requirements established by the decisions of this Court.

As has been heretofore pointed out, the test which the remaining remedies must meet, has been phrased differently in different decisions of this Court, but there is no reason why each of the tests cannot be applied to the remaining remedy in this instance. For instance, is the remedy so burdened with conditions and restrictions as to make it hardly worth pursuing? *Bronson v. Kinzie, supra.* Is the remedy effective and enforceable and fairly sufficient to serve its purpose? *Waggoner v. Flack, supra.* Is the remedy substantial? *Ettar v. Tacoma, supra.* Is the remedy adequate and efficacious for its purpose? *Antoni v. Greenhow, supra.*

In reply to these queries, it may be said that the remedy is one which is given in courts of chancery of the State of Maryland for the foreclosure of all mortgages independently of any assent of the mortgagor or the provisions of the mortgage. It may also be said that the equitable remedy which is available to the Respondents is the usual remedy, and in many instances the only remedy, available to the ordinary litigant in equity. It is the only remedy available to a mortgagee seeking to foreclose a mortgage in the District Court of the United States for the District of

Maryland. Can a remedy be held to be insufficient from a constitutional standpoint under the contract clause when it is the only remedy afforded for the foreclosure of mortgages in the federal court of this District? The Respondents have available to them every remedy which is available to the ordinary litigant at law or in equity for the purpose of collecting a debt or enforcing a lien upon real property. If these remedies suffice for other litigants, they ought not to be held to be so unsubstantial or lacking in coercive power as to leave mortgagees without effective and enforceable remedies for establishing their rights.

It should not be overlooked that the remedy, of which the Respondents are temporarily deprived, was intended to supplement rather than supersede existing remedies; that it was intended to provide a summary mode of reaching a foreclosure decree, *Williams v. Williams,* 7 Gill. 302, 305, and that this "summary and peculiar proceeding prescribed by the Legislature," *Cronise v. Clark,* 4 Md. Ch. 403, has no bearing upon the mortgage debt or the substantial obligations of the contract but was intended to be entirely remedial. So considered, it would seem that the clear implication of such decisions as *Tennessee v. Sneed,* 96 U. S. 769, *Antoni v. Greenhow,* 107 U. S. 769, and *Fourth National Bank v. Francklyn,* 120 U. S. 747, heretofore cited, tends to support the validity of regulatory legislation of this character.

When we turn from the decisions of this Court to those of State tribunals, we find such legislation gen-

erally sustained. In *People Ex Rel Brixton Operating Corp. v. La Fetra,* 194 App. Div. (N. Y.) 523, the court sustained an act of the New York legislature abrogating summary remedies available to landlords in New York City, and held that such legislation could be applied to existing leases. The decision was plainly not based upon the existence of an emergency for in *People Ex Rel H. D. H. Realty Corp. v. Murphy,* 194 App. Div. 530, the same court condemned legislation limiting the substantive rights of landlords under similar leases. The reasoning of the Court appears from the following quotation: (525, 527-528)

> "Appellant contends that inasmuch as the remedy by summary proceeding was given when the lease was made, it was not competent for the Legislature to withdraw it as to existing contracts. In *People ex rel. H. D. H. Realty Corp. v. Murphy* (*supra*) we are expressing the opinion that the Legislature could withdraw or modify this remedy at will provided it left another adequate remedy for recovering the possession of the property. The learned counsel for the appellant argues the point somewhat more at length than it was argued in the other case and cites additional authorities but he cites none which we regard as entitling a party to a contract to *the precise remedy* for its violation or enforcement that was afforded at the time the contract was made, and we understand the rule now to be that a *statutory* remedy may be modified or withdrawn and that any remedy may be modified or changed so long as rights secured by contracts are not substantially impaired and some adequate remedy remains. (*Van Rensselaer v. Snyder,* 13 N. Y. 299; *Conkey v. Hart,* 14 id. 22;

Edwards v. Kearzey, 96 U. S. 595; *Gilman v. Tucker,* 128 N. Y. 190; *Laird v. Carton,* 196 id. 169; *Lazarus v. Metropolitan Elevated R. Co.,* 145 id. 581; *Story v. Furman,* 25 id. 214; *Fourth Nat. Bank v. Francklyn,* 120 U. S. 747; *Pittsburg Steel Co. v. Baltimore Eq. Soc.,* 226 id. 455; *McGahey v. Virginia,* 135 id. 662; *Henley v. Myers,* 215 id. 373; *Cooley Const. Lim.* (7th ed.) 411. See, also, *Southwick v. Southwick,* 49 N. Y. 510). The authority, however, of the Legislature to change the remedy does not authorize the substitution of a remedy by which a party may not recover what he was entitled to recover under the contract and the laws existing when it was made. This is well illustrated by *McCracken v. Hayward,* (43 U. S. (2 How.) 608). * * *

"Although broad language was there used which might indicate that a party was entitled to the particular remedy existing at the time of contracting, it must be read in the light of the prior admission in the opinion that it was left to the States to prescribe and shape the remedy. That opinion and like doctrine in other cases have not been regarded as limiting the authority of the Legislature with respect to changing statutory remedies; and in respect to such remedies, at least, the general rule is that contracts are deemed to have been made subject to legislation changing the remedy for the enforcement thereof. (*Van Rensselaer v. Snyder, supra; Conkey v. Hart,* 14 N. Y. 22; *Guild v. Rogers,* 8 Barb. 502; *Stocking v. Hunt,* 3 Den. 274; *Laird v. Carton, supra.*)"

On appeal it was held that the abrogation of summary remedies was but a part of a broader scheme of emergency legislation which must stand or fall to-

gether. For this reason the Court of Appeals elected to place its affirmance on a broader ground than that chosen in the court below. However in the opinion of Judge POUND there appears the following statement (*Durham Realty Co. v. La Fetra,* 230 N. Y. 429, 440) (p. 440):

> "We would not hesitate to say that the legislature might repeal or suspend in whole or in part the remedy of summary proceedings for the possession of real property, provided by the Code of Civil Procedure. The landlord has no vested or contractual property right in any particular form of remedy so long as he is permitted effectively to recover possession of his real property, and the only effect of the law in question is temporarily to deprive the landlord of the summary remedy given by the statute, except in certain cases. A general act abolishing such remedy would not impair the obligation at the contract (*Conkey v. Hart,* 14 N. Y. 22)."

In the few cases which have arisen the courts have not hesitated to apply this doctrine to legislation relating to mortgage foreclosures. In *State v. Circuit Court,* — S. D. —, 249 N. W. 631, the Supreme Court of South Dakota considered Chapter 135 of the Acts of 1933 of South Dakota, which provided in effect that upon the commencement of any advertising under the power of sale contained in any mortgage, the mortgagee might appear and by petition require the mortgagor to foreclose by action, which was a more tedious remedy. The appellant claimed the Act unconstitutional, in that the remedy being part of the obligation

of the contract, it was immune from change. The Court upheld the constitutionality of the legislation, stating that whether the power of sale in the mortgage was only a naked power or a power coupled with an interest, the fact remained that the practical and only purpose of the power was to give to the mortgagee a remedy to enforce the real obligation of the contract, that is, to subject the security to the payment of the debt; that as a power of sale could be exercised only in the manner prescribed by law, there was necessarily reserved to the State the power to control and regulate the exercise of that remedy. To the same effect is *Scott et al. v. District Court et al.*, 15 N. D. 259, and *Woltz et al. v. Asheville Safe Deposit Co.*, 206 N. C. 239.

In the courts below emphasis was laid upon the fact that the employment of the remedy provided by the Act of 1898 was *assented to* in the mortgage, and that this served to make the Respondents' right to pursue its remedy a part of the obligation of the contract, bringing it within constitutional protection. But it is evident that the *assent* in the mortgage does not create a remedy but merely removes an obstacle to the exercise of a remedy already provided by the statute. The assent to the decree in the mortgage is necessary in order that the mortgagee may avail himself of the remedy provided by the statute. The remedy, however, flows from the statute and not from the assent.

Furthermore it has been long since settled that the parties may not stifle the State's power to regulate

remedies by stipulating for a specific remedy. Thus in *Conkey v. Hart*, 14 N. Y. 22, a statute abolishing distress for rent was upheld in its application to existing leases stipulating for this specific remedy. The Court said (pp. 29, 30):

> "In the view taken by the supreme court, the contract in substance contains a stipulation between these parties that this state shall continue in force the legal process of distraining for rent. If this is a subject on which parties can contract, and if their contracts when made become by virtue of the constitution of the United States superior to the power of the legislature, then it follows that whatever at any time exists as part of the machinery for the administration of justice may be perpetuated, if parties choose so to agree. That this can scarcely have been within the contemplation of the makers of the constitution, and that if it prevail as law it will give rise to grave inconveniences, is quite obvious. Every such stipulation is in its own nature conditional upon the lawful continuance of the process. The state is no party to their contract. It is bound to afford adequate process for the enforcement of rights; but it has not tied its own hands as to the modes by which it will administer justice. Those from necessity belong to the supreme power to prescribe; and their continuance is not the subject of contract between private parties. In truth it is not at all probable that the parties made their agreement with reference to the possible abolition of distress for rent. The first clause of this special provision is, that the lessor may distrain, sue, re-enter, or resort to any other legal remedy, and the second is, that in cases of distress the lessee waives the exemption

> of certain property from the process, which by law was exempted. This waiver of exemption was undoubtedly the substantial thing, which the parties had in view; but yet, perhaps, their language cannot be confined to this object, and it may therefore be proper to consider the contract as if it had been their clear purpose to preserve this legal remedy, even if the legislature should think fit to abolish it. In that aspect of it the contract was a subject over which they had no control."

See COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed. p. 591, and cf. *Mason v. Haile,* 12 Wheat. 370.

There is substantial basis, therefore, for the contention that the legislation here assailed is such as might be justified under normal conditions. But, as this Court well knows, extraordinary conditions prevailed when the Legislature acted, and still prevail today. Their significance will appear from the discussion which follows.

POINT C

AN ECONOMIC CONDITION CONSTITUTING AN EMERGENCY EXISTING (AND CONTINUING), THE ACT IS A LEGITIMATE EXERCISE OF THE POLICE POWER OF THE STATE

Much of the evidence in the record was adduced in an attempt to impugn the motives of the Legislature and is clearly irrelevant, *Antoni v. Greenhow,* 107 U. S. 769; *Home Bldg. & L. Assn. v. Blaisdell,* 290 U. S. 398, but there is enough to show that the finding contained in the legislative preamble was amply justified. The existence of an emergency in the economic affairs of the State of Maryland is, as observed by the Court of

Appeals, a generally recognized fact (Record p. 125). This emergency produced many unwholesome practices, and none more destructive than that which the challenged legislation sought to check. For this practice tended to prolong and intensify the very emergency which made it possible.

By reason of the chaotic condition of the real estate market in Baltimore City, large properties cannot bring anything like their value when offered at foreclosure sale (Record pp. 40, 55). Foreclosure proceedings thus result in ruin to debtor and creditor alike. But this very threat of ruin to the creditor gives a powerful weapon to the holder of a small fractional interest in a mortgage. The menace of the holder of the small interest is intensified by the summary remedy available under the Act of 1898, the exercise of which the Legislature has sought to regulate. For, prior to Chapter 56 of the Acts of 1933, Special Session, the holder of a minute interest in a mortgage was able to obtain a decree for the sale of property without the consent, co-operation or knowledge of any interested party. Furthermore, any loss which might otherwise result to the aggressor from a forced sale could be minimized or eliminated by controlling the choice of a trustee to make sale of the property (Record p. 54).

At the time when the Legislature acted, abuses of this remedy were apparent and thus it is that we find the Court of Appeals saying (Record p. 126):

"It was doubtless brought to the legislative attention that under the provisions of the existing

law the holders of minute fractions of a mortgage were making use of its provisions in cases where the real and substantial interests of the large majority holders in a given mortgage would have their security, and the opportunity of realizing the full amount of the mortgage, seriously endangered. This being in the legislative mind is demonstrated by the preamble of the Acts in question."

Manifestly, continuance of such abuses would have further depressed the market for real estate and thus injured the interest of trust estates, insurance companies, savings banks and other similar public institutions (Record pp. 55, 56).

At the last term of this Court the relation of the existence of an emergency to the power of the State to regulate contracts in the public interest was carefully considered, and in *Home Bldg. Assn. v. Blaisdell,* 290 U. S. 398, it was determined that the States have the power, without violation of the Federal Constitution, to meet a paramount public need by regulating remedies available to mortgagees even though the result is partially to modify the substantive rights of the parties. The limitations surrounding that doctrine were clearly stated in *W. B. Worthen Co. v. Thomas,* 292 U. S. 426, 432.

The application of these principles to the case at bar cannot be in doubt. The necessity for a limited and temporary interposition with respect to the enforcement of the respondent's contract clearly appears from the legislative finding, the testimony produced at the hearing below, and the opinion of the Court of Ap-

peals. The reasonableness of the relief extended is equally apparent and is also attested by the Court of Appeals in sustaining this legislation against the objection now to be considered, that it contravened the Fourteenth Amendment.

II

The contention was advanced below that the legislation here assailed denies respondents the equal protection of the laws guaranteed by the Fourteenth Amendment. This contention was rejected by the Court of Appeals for reasons stated as follows (Record p. 126):

> "We must bear in mind that this legislation deals solely with a remedy, and the Legislature doubtless concluded that the remedies theretofore afforded for every fractional owner of a mortgage should be modified or changed so that the particular remedy could only be exercised by those mortgagees, singly or in combination, who controlled or represented 25% of the mortgage debt. It was doubtless brought to the legislative attention that under the provisions of the existing law the holders of minute fractions of a mortgage were making use of its provisions in cases where the real and substantial interests of the large majority holders in a given mortgage would have their security, and the opportunity of realizing the full amount of the mortgage, seriously endangered. This being in the legislative mind is demonstrated by the preamble of the Acts in question. This was an evil found by the Legislature to exist, and the purpose of the classification was to diminish the evil by determining that this remedy should be only available to those holding at least 25% of

> the mortgage debt then unpaid. The classification thus made would seem clearly to have direct relation to the purpose which the Legislature had in mind, and which we cannot say was arbitrary or fanciful."

It is submitted that the decision below was clearly right. In *Wampler v. Le Compte,* 282 U. S. 172, this Court sustained an act of the General Assembly of Maryland denying to riparian owners having less than a certain length of shore frontage the privilege of erecting a ducking blind. In sustaining this legislation against the challenge that it denied the small riparian owner the equal protection of the laws, this Court, speaking through Mr. Justice BRANDEIS, said, p. 174:

> "The provision which prohibits placing a blind within 250 yards of the land of an adjoining owner without securing his consent, is a necessary incident of the preferential right conferred upon riparian owners. See *Sheehy v. Thomas,* 155 Md. 688. There was obviously no intention to discriminate in favor of persons having a large water frontage; for the consent provision enables owners of small frontages to join in erecting blinds spaced the requisite distance apart."

The analogy to the present case seems clear. The classification in that law was based on the amount of shore frontage owned. It is true that the classification bore an obvious relation to a legitimate object of legislative regulation, that is to say, the conservation of wild life and the protection from injury of those engaged in the sport of shooting ducks. The fact remains, however, that the classification did deprive the small shore

front owner of a privilege extended to the owner of the larger frontage.

There are other instances where legislation establishing classes based upon similar differences has been sustained. As Mr. Justice VANDEVANTER said in sustaining legislation of the State of New York regulating secret societies having more than twenty members *Bryant v. Zimmerman,* 278 U. S. 63, 77:

> "Classification based on numbers is not necessarily unreasonable. There are many instances in which it has been sustained."

See a note to the dissenting opinion of Mr. Justice BRANDEIS in *Louisville Gas Co. v. Coleman,* 277 U. S. 32, 42, and cf. *State Board of Tax Commissioners v. Jackson,* 283 U. S. 527.

These illustrations, it is submitted, are sufficient to show that the Legislature may classify and deny to a small group a privilege extended to a larger group or vice versa, wherever such a classification bears a reasonable relation to a proper legislative end. Applying this test to Chapter 56 of the Acts of 1933, Special Session, 1933 there can be no question that the classification therein established bore a reasonable relation to the legislative object. The legislative object was to prevent the abuse of the remedy afforded by the Act of 1898. That object was obtained by requiring that the holders of an interest of not less than 25% of a mortgage deed join in any attempt to invoke that remedy. Without this classification the Legislature would face the alternative either of denying the

remedy entirely unless the entire mortgage interest were represented, a practical impossibility in many cases, or of permitting the existing abuses to go unregulated.

We submit therefore that the classification created by the Act is reasonable and that the respondents were not deprived of the equal protection of the laws within the meaning of the 14th Amendment.

CONCLUSION.

We have sought to show that Chapter 56 of the Acts of 1933, Special Session, is an exercise of the power reserved to the States to regulate the remedy for the enforcement of contracts and should be sustained without regard to the existence of an emergency. We have further sought to show that this legislation may be sustained upon the principles heretofore laid down by this Court as reasonably adapted to meet a paramount public need arising out of an emergency in the economic affairs of the State of Maryland. For these reasons it is submitted that the Court of Appeals of Maryland erred in striking down this legislation as in conflict with the Federal Constitution.

Respectfully submitted,

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APPENDIX A

ACTS OF THE GENERAL ASSEMBLY OF MARYLAND OF 1898, CHAPTER 123, SECTIONS 720 TO 732, INCLUSIVE.

ARTICLE 4 OF THE CODE OF PUBLIC LOCAL LAWS OF MARYLAND (1930 EDITION), ENTITLED "BALTIMORE CITY," SUB-TITLE "MORTGAGES", SECTION 720.

720. In all cases of conveyances of lands or hereditaments or of chattels real, or goods and chattels personal, situate in the said city, wherein the mortgagor shall declare his assent to the passing of a decree for the sale of the same, it shall be lawful for the mortgagee or his assigns at any time after filing the same to be recorded, to submit to either of the Circuit Courts of Baltimore City the said conveyances or copies thereof, under seal of the Superior Court; and the Circuit Court to which the same is so submitted, may thereupon forthwith decree that the mortgaged premises shall be sold at any one of the periods limited in said conveyances for the forfeiture of said mortgages or limited for a default of the mortgagors, and on such terms of sale as to the said court may seem proper, and shall appoint by said decree a trustee or trustees for making such sale, and shall require bond and security for the performance of the trust as is usual in cases of sales of mortgaged premises.

721. The trustee or trustees so appointed, after having given bond with security, may, after the arrival of the period limited by the decree for a sale, sell, agreeably to the terms of said decree, the mortgaged property or any part thereof; the mortgagees, their executors, administrators or assigns, if the mortgage claim shall have been assigned before such sale, or their duly constituted agent or attorney, after the arrival

of the period aforesaid, verifying by their oath a statement of the amount of said mortgage claim remaining due, before the Judge of said court or before any Justice of the Peace of this State, the official character of any Justice of the Peace for any county being certified under his official seal by the Clerk of the Circuit Court for the county where the affidavit is made, where the affidavit is made outside of the City of Baltimore, or before any person outside of this State authorized to take acknowledgments of deeds; and such statement shall be filed in said court.

722. Such sales and the conveyances thereupon shall have the same effect, if finally ratified by said court, as if the same had been made under decrees between the proper parties in relation to the mortgages, and in the usual course of said court.

723. The trustee or trustees shall report the sales to the court for its consideration and ratification or rejection; and such orders shall pass therein touching such ratification as are usual on sales of mortgaged property in said court.

724. Any allegations may be made, and proof under the orders of the said court exhibited, and a trial of the allegations had as the court shall prescribe, to show that the sales ought not to have been made.

725. The said court, upon being satisfied of the truth of said allegations, shall reject and set aside the sale, and in such case no part of the costs or expenses or trustee's commission, if any such commission be claimable, in relation to the said sales, shall be chargeable upon said property, or the mortgagors, their heirs, executors, administrators or assigns, but shall be wholly chargeable against the persons at whose in-

stance or for whose benefit the said sales shall have been proposed to be made.

726. The clerk of said court shall file and record the said decrees, and docket the cases of the application therefor; and in the said decree and to be recorded therewith, shall file a copy of the mortgage upon which the same was rendered, and shall be entitled in the usual fees for such services.

727. Any entry on the docket of said court by the person entitled to assign the said mortgage claim, of the use and benefit of said decrees, shall have the same effect as assignments, and conveyances of the said mortgage interests, to have effect and precedence from the time of their respective entries; and the said entries shall not be made without an order or direction in writing, to be acknowledged before the Judge of said court, or a Justice of the Peace, by the persons purporting to sign the same, and filed and recorded by said clerk.

728. The duly authorized entries upon the docket of said court, of the satisfaction of said decrees, and the discharge of said mortgage claims, made by the persons entitled to receive said claims, shall have the same effect to discharge the mortgaged property of said mortgage, and all liens thereunder, as any conveyances by the parties interested in such claims, and the holders of the legal estate and interests therein, if competent to convey, could have at law, or in equity; but such entries shall not be made without an order or direction in writing, acknowledged by the persons purporting to have signed the same, before the Judge of said court, or a Justice of the Peace, and filed by the clerk of said court; and the entries shall refer to such orders or directions, and the names of the persons aforesaid; and

said order and directions shall be recorded in said court with said decrees.

729. The said court may, at its discretion, from time to time, appoint any other trustee or trustees in place of those appointed by the decree; and the proceeds of such sales shall be accounted for, to, and distributed by, said court, in the manner usual in cases of sales under decrees of said court.

730. Any mortgagee of property in the City of Baltimore, his assignee or executor, where a power to sell is contained in the mortgage, may proceed under Article 66 of the Public General Laws, title "Mortgages", but notices of sale under such power shall be published in two daily newspapers in said city for the period required by law.

731. Where a default of the mortgagors has taken place before the said conveyances have been submitted to the Circuit Court of Baltimore City, it shall, nevertheless, be the duty of said court, upon the submission of the said conveyances to such court, after the said default, to forthwith decree that the mortgaged premises shall be sold on such terms of sale as to the said court shall seem proper, and to appoint by said decree a trustee or trustees to make such sale, requiring bond and security for the performance of the trust, as is usual in the case of the sale of mortgaged premises; and the said trustee or trustees may sell the same agreeably to the terms of the said decree; but before each sale the mortgagee or mortgagees, or some of the mortgagees, or the executor or administrator of a deceased mortgagee, or the assignee or assignees of the mortgagee or one of such assignees, or the executor, or administrator of a deceased assignee, shall file in the court in which the said proceedings are pending, a

statement of the amount of the said mortgage claim remaining due, verifying the same by the oath or affirmation of the party filing the same; and the said affidavit or affirmation may be made before any of the persons mentioned in section 721 of this Article, and the same shall be authenticated as provided for in section 721.

731a. If, upon a sale of the whole mortgaged property by virtue of a decree passed under an assent to the passing of a decree contained in the mortgage under the provisions of section 720 of this Article, the net proceeds of sale, after the cost and expenses allowed by the court are satisfied, shall not suffice to pay the mortgage debt and accrued interest, as the same shall be found and determined by the judgment of the court upon the report of the auditor thereof, the court may, upon the motion of the plaintiff, the mortgagee or his legal or equitable assignee, after due notice, by summons or otherwise, as the court may direct, enter a decree *in personam* against the mortgagor or other party to the suit or proceeding, who is liable for the payment thereof, for the amount of such deficiency; *provided* the mortgagee or his legal or equitable assignee would be entitled to maintain an action at law upon the covenants contained in the mortgage for said residue of said mortgage debt so remaining unpaid and unsatisfied by the proceeds of such sale or sales; which decree shall have the same effect and be a lien as in a case of a judgment at law, and may be enforced in like manner by a writ of execution in the nature of a writ of *fieri facias* by attachment or otherwise.

732. The provisions of sections 722 to 729, inclusive, of this Article, shall apply to all the proceedings under section 731.

ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, SPECIAL SESSION, 1933, CHAPTER 56.

AN ACT to add a new section to Article 4 of the Code of Public Local Laws of Maryland (1930 Edition), entitled "Baltimore City", sub-title "Mortgages", said new section to be known as Section 720A and to follow immediately after Section 720 of said Article, relating to securing decrees under mortgages containing an assent to such decrees for a foreclosure sale.

WHEREAS, Under the aforesaid Section 720, as the same has been construed by the Court of Appeals of Maryland, a holder of a fractional interest, no matter how small, in a debt secured by a mortgage, may now secure a decree under the assent to such decree contained in such mortgage, and upon any default in such mortgage, the trustee named in said decree may foreclose the same, even though such foreclosure be against the wishes of the holders of the remainder of said debt secured by said mortgage; and

WHEREAS, By reason of the prolonged business depression, there has been an abnormal deflation of real and leasehold property values in Baltimore City, and any precipitate foreclosure would affect seriously the investment in such mortgage, perhaps injuring irrevocably the safety of the investment; and

WHEREAS, By reason of the aforegoing and other adverse conditions, an emergency is hereby declared to exist as a matter of Legislative determination, necessitating Legislative intervention by the enactment of the provisions hereinafter prescribed, and their application during such emergency; now therefore,

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That a new section be and the same is hereby added to Article 4 of the Code of Public Local Laws of Maryland (1930 Edition), title "Baltimore City," sub-title "Mortgages," said new section to be known as 720A and to follow immediately after Section 720, and to read as follows:

720A. In all cases submitted to either of the Circuit Courts of Baltimore City for the passage of a decree as provided for in Section 720 aforesaid, no such decree shall hereafter be passed during the period of emergency hereinafter declared, unless such application is made or concurred in by the record holders of not less than 25% of the entire unpaid mortgage debt, it being hereby declared to be the intent of this Section during the period this Section is effective, that the holder or holders of a fractional interest in an entire mortgage debt of less than 25% of the entire interest, shall not have recourse to the summary and exparte remedies given under Section 720. Where any holder of a fractional interest in an entire mortgage debt is an infant or otherwise incompetent, such consent may be given by his guardian or committee as the case may be, or if there is no such guardian or committee, then such consent may be given by his next friend, and any consent so given shall be as valid and effective for the purpose of this Act as if such holder were not under any disability.

SEC. 2. *And be it further enacted,* That the period of the emergency hereinbefore declared as a matter of Legislative determination, shall be the period of time from the date this Act takes effect to the first day of June, 1935.

SEC. 3. *And be it further enacted,* That this Act is hereby declared to be an emergency law and necessary for the immediate preservation of the public health and safety, and having been passed upon by a yea and nay vote, supported by three-fifths of all the members elected to each of the two Houses of the General Assembly, the same shall take effect from the date of its passage.

Approved December 15, 1933.

APPENDIX B

ARTICLE 66, ANNOTATED CODE OF MARYLAND (1924 EDITION), ENTITLED "MORTGAGES," SECTIONS 6 TO 10, INCLUSIVE

6. In all mortgages there may be inserted a clause authorizing the mortgagee or any other person to be named therein to sell the mortgaged premises, whether lands or goods and chattels, upon such terms and on such contingencies as may be expressed therein, and where the interests in any mortgage are held under one or more assignments, or otherwise, the power of sale therein contained shall be held divisible, and he or they holding any such interest who shall first institute proceedings to execute such power shall thereby acquire the exclusive right to sell the mortgaged premises; and any sale made and set aside upon the ground that said power is indivisible may, by the court that set aside such sale, be reviewed on the petition of the person who made the same, or any other person interested therein, and said court may annul its former decree or order, and thereupon the same procedings shall be had and the said court shall have the same full power as if such sale had not been set aside, and the

said court may confirm such sale or set it aside for any other sufficient reason than that the aforesaid power is indivisible; provided, there has been no change of title or interest in the mortgaged premises since such sale.

7. Before any person so authorized shall make any such sale, he shall give bond to the State in such penalty and with such security as shall be approved by the judge or clerk of a court of equity of the city or county in which the mortgaged premises lie, or in case of goods and chattels, where the same may be, to abide by and fulfill any order or decree which shall be made by any court of equity in relation to the sale of such mortgaged property or the proceeds thereof, and such bonds shall be and remain as an indemnity to and for the security of all persons interested in such mortgaged property or the proceeds thereof and be subject to be sued as other bonds taken in the name of the State and subject to the same limitations and disabilities as such other bonds.

8. In all sales made in pursuance of such authority there shall be given such notice as may be stated in such mortgage, or if there be no agreement as to notice, then the party offering the same for sale shall give twenty days' notice of the time, place and terms thereof by advertisement in some newspaper printed in the county where the mortgaged premises lie, if there be one so published, and, if not, in a newspaper having a large circulation in said county, and also by advertisement set up at the court-house door of said county.

9. All such sales shall be reported under oath to the court having chancery jurisdiction where the sale is made, and there shall be the same proceedings on such

report as if the same were made by a trustee under a decree of said court, and the court shall have full power to hear and determine any objections which may be filed against such sale by any person interested in the property and may confirm or set aside said sale.

10. If such sale be set aside by the court, a re-sale may be ordered to be made by the party who made the previous sale, or the court may, if justice requires it, appoint a trustee to sell the same.

CHAPTER 57 OF THE ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, SPECIAL SESSION, 1933

AN ACT to add a new section to Article 66 of the Code of Public General Laws of Maryland (1924 Edition), title "Mortgages," said new section to be known as Section 6A, and to follow immediately after Section 6 of said Article, suspending for the period of the Emergency hereinafter declared, the right of a holder of a fractional interest in the debt secured by any mortgage to foreclose or procure the foreclosure thereof except as provided in this Act.

WHEREAS, Under said Section 6 of Article 66 of the Code of Public General Laws of Maryland (1924 Edition) the holder of a fractional interest, no matter how small, in a debt secured by a mortgage, may now sell or procure the sale of the mortgaged property in accordance with the power of sale contained in such mortgage, after a default has occurred in such mortgage, even though such sale be against the wishes of the holders of the remainder of said debt secured by said mortgage; and,

WHEREAS, By reasons of the prolonged business depression, there has been an abnormal deflation of real and leasehold property values in the State of Maryland, and any precipitate foreclosure sales would affect seriously the investment in such mortgage, perhaps injuring irrevocably the safety of investment; and

WHEREAS, By reason of the aforegoing and other adverse conditions, an emergency is hereby declared to exist as a matter of Legislative determination, necessitating Legislative intervention by the enactment of the provisions hereinafter prescribed, and their application during such emergency; now therefore

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That a new section be and the same is hereby added to Article 66 of the Code of Public General Laws of Maryland (1924 Edition), title "Mortgages," said new section to be known as Section 6A to follow immediately after Section 6, and to read as follows:

6A. In all mortgages of real and/or leasehold property heretofore given or hereafter given, wherein there is inserted a clause authorizing the mortgagee or any other person to be named therein to sell the mortgaged premises, upon such terms and on such contingencies as may be expressed therein, the power of sale therein contained shall not be exercised during the period of the emergency aforesaid, except by and with the consent of the record holders of not less than 25% of the entire unpaid principal debt secured by the mortgage sought to be foreclosed, it being hereby declared to be the intent of this Section during the period this Section is effective, that the holder or holders of a fractional interest in the entire mortgage debt of less than 25% of the entire interest, shall not have recourse to the

summary and exparte remedies given under said Section 6 of Article 66 as aforesaid. Where any holder of a fractional interest in an entire mortgage debt is an infant or otherwise incompetent, such consent may be given by his guardian or committee as the case may be, or if there is no such guardian or committee, then such consent may be given by his next friend and any consent so given shall be as valid and effective for the purpose of this Act as if such holder were not under any disability.

SEC. 2. *And be it further enacted,* That the period of the emergency hereinbefore declared as a matter of Legislative determination, shall be the period of time from the date this Act takes effect to the first day of June, 1935.

SEC. 3. *And be it further enacted,* That this Act is hereby declared to be an emergency law and necessary for the immediate preservation of the public health and safety, and being passed upon by a yea and nay vote, supported by three-fifths of all the General Assembly, the same shall take effect from the date of its passage. Approved December 15, 1933.

APPENDIX C

SUMMARY FORECLOSURES OF MORTGAGES UNDER A POWER OF SALE CONTAINED IN THE MORTGAGE.

The power of sale contained in the mortgage is in the following language (Record p. 5): "and upon any default in the terms of this mortgage, a sale may be made by the said mortgagee, its successors or assigns, or by its or their attorney, under Article LXVI, Sections 6 to 10 inclusive of the Maryland Code of 1904,

Public General Laws or any other general or local laws of the State of Maryland relating to mortgages."

The remedy authorized by these sections will be found under the same article and section numbers in the Annotated Code of Maryland 1924. These statutes were not intended to confer a new or special jurisdiction on courts of equity. In proceedings under these statutes there is no necessity for any court to appoint a trustee to sell. The mortgagee or his attorney is clothed with such authority by the consent contained in the mortgage and from the filing of the bond, as required by the statute. The power to sell is substituted for a decree. The mortgagor is entitled to no notice of the proceedings to sell and no questions can be raised as to who are to be parties to the proceedings. The statute expressly provides, where the interest in any mortgage are held under one or more assignments or otherwise, the power of sale therein contained shall be divisible, and he or they holding any such interest, who shall first institute proceedings, to execute such power, shall thereby acquire the exclusive right to sell the mortgaged premises.

The proceedings are commenced by filing the mortgage or a certified copy of it and a direction to the clerk of the circuit court in equity in the city or county where the land lies to docket the case. Before making a sale, the person authorized to make it must file a bond. The bond may be filed at any time before the sale. It need not be filed before the advertisement. The nature of the bond is provided by the statute as well as the approval thereof. There must be given a notice or advertisement of the sale. The sale must be in conformity with the advertisement and it must be made in the county or city where the mortgaged premises are situated. The sale being made, a report of

sale must be filed in conformity with the statute. The mortgagee's or the attorney's report of sale is his first official intercourse with the court and its supervisory power then commences and the court cannot revise, confirm, ratify or reject the sale until it has been reported. On such report the jurisdiction of the court becomes complete and equitable principles such as are applicable to sales under decrees in other cases prevail. From this point on the proceedings are carried to a conclusion in the same manner as foreclosure proceedings conducted by bill in equity.

For further treatment of foreclosure under power of sale authorized by the mortgage, see MILLER, EQUITY PROCEDURE (1897) Section 452 et seq. VENABLE, SYLLABUS ON LAW OF ESTATES, pages 219 to 222. Also see Annotations to Sections 6 to 10 inclusive of Article 66, Vol. II, Annotated Code of Maryland (1924), and also supplement to the Annotated Code of Maryland (P.G.L. 1929) under corresponding section numbers.